(1) Supreme Court, U.S.
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No. 00-

IN THE
Supreme Court of the United States

REGINALD L. SYDNOR,

Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION, AND THE OFFICE OF PERSONNEL MANAGEMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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79 pp

QUESTIONS PRESENTED

I.

Are Federal Administrative Agencies Constitutionally Mandated to Comply with Federal Statutory and Regulatory Disciplinary Due Process Procedures when Disciplining Federal Employees.

II.

Is a Federal District Court Mandated to Comply with Federal Statutory Due Process Procedure In the Appeal of an Administrative Federal Employer Discrimination Case.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the United States Merit Systems Protection Board now becomes a necessary party to this proceeding because its administrative procedure and judgment are also sought to be reviewed by this Court.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Statutory and Regulatory Provisions Involved	1
Statement of the Case	3
A. Disciplining Federal Agencies' Factual and Procedural Background	4
B. The Court Proceedings Below	9
Reasons for Granting the Writ	11
I. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Ruling On The Constitutional Demand For Due Process When Removing A Federal Employee From Federal Employment.	11

Contents

Page

II. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court, The Federal Circuit And The Fourth Circuit's Prior Rulings On The Importance Of A Due Process Trial *De Novo* When An Administrative MSPB Discrimination Case IsAppealed To A Federal District Court. . . . 15

Conclusion 17

TABLE OF CITED AUTHORITIES

Page

Cases:

Chandler v. Roudebush, 425 U.S. 840 (1976) 15

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 12

Engdabl v. Department of the Navy, 900 F.2d 1572 (Fed. Cir. 1990) 14

Hayes v. United States Government Printing Office, 684 F.2d 137 (Fed. Cir. 1982) 15

In the matter of I. Speilman, Administrative Law Judge, Social Security Administration, Departments of Health, Education and Welfare, 1MSPB 51 (1979) 8

Jones v. Department of Army, 68 MSPB 398 (1995) 14

Mercer v. Department of Health and Human Services, 772 F.2d 856 (Fed. Cir. 1985) 14

Pittman v. Merit Systems Protection Board, 832 F.2d 598 (Fed. Cir. 1987) 14

Rana v. United States of America, 812 F.2d 887 (4th Cir. 1987) 15

Cited Authorities

Page

Statutes:

5 U.S.C. § 7521 ..... 1, 3, 7, 8, 13, 14

5 U.S.C. § 7703 .....4, 9, 11, 15

5 U.S.C. § 7703(c) 2, 4

28 U.S.C. § 1254(1) 1

Rule:

F.R.C.P., Rule 56(f) 9, 10

United States Constitution:

Fifth Amendment 1

Other Authorities:

5 C.F.R. § 1201.115(d)(1) 8

5 C.F.R. § 1201.137 .....2, 8, 14

5 C.F.R. § 1201.137(a) 3

5 C.F.R. § 1201.140 .....3, 7, 8, 13

5 C.F.R. § 1201.140(a) 3, 8

5 C.F.R. § 1201.142 .....3, 8, 13, 14

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The Fourth Circuit Dated And Decided March 30, 2000 ..... 1a

Appendix B — Memorandum Of The United States District Court For The District Of Maryland Dated October 25, 1999 And Filed October 26, 1999 ... 3a

Appendix C — Order Of The United States Of America Merit Systems Protection Board Dated December 30, 1998 ..... 6a

Appendix D — Initial Decision Of The United States Of America Merit Systems Protection Board, Washington Regional Office Dated June 11, 1998 ..... 10a

Appendix E — Initial Decision Of The United States Of America Merit Systems Protection Board, Washington Regional Office Dated June 3, 1998 ..... 36a

Appendix F — Letter From Robert E. Taylor, United States Merit Systems Protection Board To Alan B. Epstein, Esq. Dated May 12, 1998 ..... 43a

Appendix G — Order Of The United States Of America Merit Systems Protection Board, Washington Regional Office Denying Appellant's Motion For Interlocutory Appeal And Denying Motion For Petition For Review Of Denial Dated May 5, 1998 ..... 45a

Appendices

Page

Appendix H — Order Of The United States Court Of Appeals For The Fourth Circuit Denying Petition For Rehearing Dated And Filed July 10, 2000 ..... 48a

Appendix I — Mandate Of The United States Court Of Appeals For The Fourth Circuit Dated And Filed July 18, 2000 ..... 50a

Appendix J — Additional Relevant Documents ... 51a

Petitioner, Reginald L. Sydnor, respectfully request that a writ of certiorari be issued to review the judgment of the United States District Court of Maryland, as affirmed by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit are neither published nor reported (App. A, H, and I). Likewise, the opinion of the United States District Court for the District of Maryland was also neither published nor reported (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 30, 2000. The Fourth Circuit Court of Appeals denied a timely petition for rehearing and hearing en banc on July 10, 2000. Therefore, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

5 U.S.C. § 7521 provides in relevant part:

> (a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the

administrative law judge is employed only for good cause established, and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board (MSPB).

(b) The actions covered by this section are

(1) a removal;

(2) a suspension;

* * *

5 U.S.C. § 7703(c) provides in relevant part:

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the Court shall review the record and hold unlawful and set aside any agency action. . . . except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial *de nova* by the reviewing Court.

5 C.F.R. § 1201.137 provides in relevant part:

(a) Covered actions. The jurisdiction of the Board, under 5 U.S.C. 7521 and this subpart with respect to actions against an administrative law judge is limited to proposals by an agency to take any of the following actions against an administrative law judge:

(1) removal;

(2) suspension;

* * *

5 C.F.R. § 1201.140 provides in relevant part:

> (a) Judge. (1) Administrative law judge will hear an action brought by an employing agency under this subpart against a respondent administrative law judge.

5 C.F.R. § 1201.142 provides in relevant part:

> An administrative law judge who alleges that an agency has interfered with the judge's qualified decisional independence so as to constitute an unauthorized action under 5 U.S.C. 7521 may file a complaint with the Board under this subpart.

STATEMENT OF THE CASE

One of the fundamental questions involved in this case is whether a federal employee is entitled to relief from a district court judgment, endorsing federal administrative agencies' strict discipline of a federal employee, in total disregard of established statutory and regulatory due process disciplinary procedure. The question arises in the context of the Social Security Administration (SSA) and the MSPB removing an appointed Administrative Law Judge (ALJ) from his position without affording disciplinary due process procedures set forth in 5 U.S.C. § 7521 and 5 C.F.R. §§ 1201.137(a), 1201.140(a) and 1201.142.

Another essential question involved in this case is whether a district court judgment should be vacated and remanded when established statutory due process procedure for the litigation of administratively appealed federal employment discrimination matters is abandoned by the

district court. The context of this question arises when the district court disregarded 5 U.S.C. § 7703. Consequently, the district court denied a federal employee a *de novo* trial in an appealed MSPB discrimination case, pursuant to 5 U.S.C. § 7703(c).

In order for this Court to fully appreciate the significance of the due process denial issues presented by this case, it is essential to consider the lengthy federal administrative factual and procedural background, as well as the federal court proceedings below, regarding both appealed due process questions.

A. Disciplining Federal Agencies' Factual And Procedural Background

On March 3, 1997, Petitioner was appointed a Social Security Administration (SSA) Administrative Law Judge (ALJ) in the Voorhees, New Jersey Social Security Office of Hearings and Appeals. Petitioner diligently performed the duties and responsibilities of an SSA, Administrative Law Judge until September 2, 1997.

On September 2, 1997, without any prior notice or expectation, the SSA delivered Petitioner an Office of Personnel Management (OPM) proposal letter dated August 19, 1997 (App. J). The letter proposed the removal of Petitioner from his SSA, Administrative Law Judge position and to debar Petitioner from all competitive federal service. OPM's disciplinary proposal was based upon an OPM suitability investigation, *initiated and orchestrated by the SSA*, which concluded Petitioner was unsuitable for federal service. The OPM conclusion was based on numerous alleged SSA initiated counts of misconduct and criminal behavior in prior federal employment and intentional falsification of application documents.

The OPM suitability investigation was unbeknownst to Petitioner and Petitioner was not consulted during or had any input into the OPM investigation, prior to the OPM's proposed disciplinary conclusion. The OPM proposal letter gave Petitioner an opportunity to respond to its investigative conclusion, only in writing, prior to OPM making its final decision. The OPM proposal letter specifically instructed that no discipline would happen to Petitioner, prior to Petitioner's response and OPM's final decision.

When the SSA delivered the OPM proposal letter to Petitioner on September 2, 1997, contrary to all OPM specific instructions regarding any pre-determined disciplinary action, the SSA decided on its own to immediately remove Petitioner on that day, from his Social Security Administration, Administrative Law Judge position. The SSA confiscated Petitioner's identification card, federal credit card and office access key card. Petitioner was verbally ordered to immediately leave the office facility and to have his office cleared of all personal belongings by the end of the week. Furthermore, SSA verbally informed Petitioner that all his pending cases and decisions would be immediately transferred to other Administrative Law Judges for final adjudication. The SSA verbally communicated to Petitioner that he was placed on unconditional administrative leave. At no time did the SSA provide Petitioner with any official authorization to support SSA's decision to remove Petitioner from his SSA, Administrative Law Judge position. Likewise, prior to any OPM final suitability determination, the SSA communicated to the OPM that SSA had already removed and placed Petitioner on indefinite suspension (App. J).

On January 13, 1998, OPM issued its final suitability decision. Although OPM found its prior investigative conclusions allegating misconduct and criminal behavior in prior federal employment was unfounded, OPM ultimately found that Petitioner had engaged in three of four OPM investigative conclusions of falsification of application documents. Therefore, OPM concluded Petitioner was unsuitable for federal employment, should be removed from his SSA, Administrative Law Judge position and debarred from all federal competitive employment, pending Petitioner's Merit Systems Protection Board (MSPB) appeal, for final determination.

On February 11, 1998, Petitioner administratively appealed his SSA's premature unauthorized removal and suspension to the MSPB. Furthermore, Petitioner appealed the merits of the OPM unsuitability determination, as well as the OPM determination being based upon a per se discriminatory violation of the Rehabilitation Act of 1973 (MSPB Docket No: PH-0731-98-01880I-1, App. J).

Petitioner's MSPB appeal to the venue Northeastern Regional MSPB office, without any explanation, was transferred to the Washington Regional MSPB office and assigned to a regional administrative judge (AJ) (App. J).

The MSPB Washington Regional Office AJ refused to consider or acknowledge Petitioner's MSPB duly appealed SSA's premature unauthorized removal and suspension of Petitioner from his SSA, Administrative Law Judge position. Therefore, the AJ refused to permit Petitioner to conduct discovery on any SSA's Administrative Law Judge removal actions because the SSA was not considered, according to the AJ, a party to Petitioner's MSPB appeal.

On March 31, 1998, Petitioner again duly appealed to the MSPB all SSA disciplinary removal suspension actions against Petitioner from September 2, 1997 to February 12, 1998 and indefinitely beyond. Petitioner specifically appealed all SSA's disciplinary removal actions against Petitioner as denying statutory due process and racially motivated in violation of Title VII of the Civil Rights Act of 1964 (MSPB Docket No: PH-0752-98-0213-I-1) (App. J). Petitioner again appealed to the venue Northeastern Regional MSPB office. Again, without any explanation, Petitioner's appeal was transferred to the Washington Regional MSPB office and assigned to the same regional AJ (App. J).

On April 17, 1998, Petitioner motioned the AJ to consolidate both MSPB Docket Nos: PH-0731-98-0188-I and PH-0752-98-0213-I-1 and forward the cases to the appropriate MSPB office of Administrative Law Judge, pursuant to 5 C.F.R. § 1201.140. The AJ denied Petitioner's motion (App. G). On May 4, 1998, Petitioner appealed interlocutory to the clerk of the MSPB to have both appeals assigned and adjudicated by a MSPB Administrative Law Judge pursuant to 5 C.F.R. 1201.140 and to have the SSA named as an appealed MSPB party, pursuant to the mandate of 5 U.S.C. § 7521. The clerk of the MSPB also denied Petitioner's request (App. F).

On June 3, 1998, the AJ dismissed all Petitioner's appealed SSA disciplinary actions and related discrimination charge against the SSA for lack of MSPB subject matter jurisdiction (App. E). On June 11, 1998, the AJ affirmed OPM's unsuitability determination and ruled Petitioner failed to prove OPM violated the Rehabilitation Act of 1973 (App. D).

Petitioner duly petitioned the MSPB for review of the AJ's initial decision in both appeals. Petitioner petitioned the MSPB to reverse the AJ's finding that the MSPB lacked subject matter jurisdiction over the SSA's disciplinary removal of Petitioner from his Administrative Law Judge position, pursuant to 5 U.S.C. § 7521, 5 C.F.R. §§ 1201.137, 1201.140(a) and 1201.142. Likewise, inter alias, Petitioner petitioned the MSPB to vacate any AJ findings on OPM's suitability determination and on the discrimination violation, pursuant to 5 C.F.R. §§ 1201.137 and 1201.140. On December 30, 1998, the MSPB consolidated both Petitioner's petitions for review and denied them without comment or opinion (App. C).

Pursuant to 5 C.F.R. § 1201.115(d)(1), on January 19, 1999, Petitioner petitioned the MSPB for reconsideration of its denial of the SSA subject matter, jurisdiction, inter alias, pursuant to newly discovered SSA FOIA information and contradictory actions of the SSA and the MSPB in the comparison case *In the matter of I. Speilman, Administrative Law Judge, Social Security Administration, Departments of Health, Education and Welfare*, 1MSPB 51, 1MSPR 54 (1979). (A Caucasian SSA Administrative Law Judge suspended sixty days, for falsification of application documents, only after opportunity for a hearing before a MSPB Administrative Law Judge).

On January 26, 1999, the MSPB informed Petitioner by letter that he had no administrative right to reconsideration, the matter was administratively closed and Petitioner's only other recourse was court proceedings (App. J). Neither Petitioner reconsideration request or the MSPB letter denial was made part of the MSPB certified record.

B. The Court Proceedings Below

On January 29, 1999, Petitioner appealed the MSPB final administrative decision to the United States District Court of Maryland, pursuant to 5 U.S.C. § 7703. The United States Attorney's office represented both the SSA and OPM in defense and duly filed a certified copy of the MSPB record with the District Court of Maryland.

The United States Attorney never answered Petitioner's complaint, but instead on July 12, 1999, filed Motions for Summary Judgment and Dismissal of all Petitioner's MSPB appealed, SSA and OPM merit and discrimination issues. The United States Attorney premised all its motions upon the MSPB administrative record it submitted to the District Court of Maryland.

On August 26, 1999, in response to the United States Attorney's Motions, Petitioner motioned the District Court to conduct needed discovery pursuant to Federal Rules of Civil Procedure (F.R.C.P. Rule 56(f), in order to adequately and fairly respond to all the United States Attorney's motions. Furthermore, Petitioner motioned the District Court to include in the certified MSPB record, submitted by the United States Attorney, MSPB excluded administrative documentation submitted to the MSPB by Petitioner, in further defense and proof of Petitioners case. Finally, Petitioner requested the District Court to grant Petitioner a reasonable time to respond to all the United States Attorney's dispositive motions, pending the District Court's rulings on all Petitioner's motions.

On September 22, 1999, the United States Attorney responded to Petitioner's Motions and requested the District

Court to rule on its earlier motions for Summary Judgment and Dismissal of Petitioner's entire case based upon the "*completeness*" of the MSPB administrative record submitted to the District Court by the United States Attorney.

On October 15, 1999, Petitioner responded to and opposed the United States Attorney's contention that the MSPB administrative record submitted to the District Court was complete. Petitioner again requested the District Court to grant Petitioner's earlier motions to the District Court in order to assure the MSPB administrative record, submitted to the District Court by the United States Attorney, was procedurally fair and administratively complete.

On October 25, 1999, the District Court issued an unpublished Memorandum and Order granting all the United States Attorney's Motions for Summary Judgment and the Dismissal of all Petitioner's MSPB appealed matters. The District Court refused to consider or even acknowledge Petitioner's F.R.C.P., Rule 56(f) motion or any other Petitioner's requests to the District Court for a fair opportunity to respond. Without any District Court consideration or even a question on the merits of the appealed administrative due process issues, the District Court summarily endorsed all the United States Attorney's motions and closed Petitioner's District Court case.

Petitioner filed a Notice of Appeal on all matters to the United States Fourth Circuit Court of Appeals on December 21, 1999. Inter alias, Petitioner appealed to the Fourth Circuit Court of Appeals the District Court's endorsement of the MSPB's conclusion that the MSPB has no statutory and regulatory jurisdiction over the removal and suspension of a SSA, Administrative Law Judge by the SSA.

Furthermore, Petitioner appealed the District Court's determination that the MSPB can arbitrarily ignore its statutory due process mandate and change its regulatory due process procedural demands for the discipline of a particular SSA, Administrative Law Judge. Petitioner also requested the Fourth Circuit Court of Appeals to remand the case back to the District Court for a trial *de novo* on the administrative discrimination issues, pursuant to 5 U.S.C. § 7703.

On March 30, 2000, the Fourth Circuit of Appeals found no error in the District Court's findings and affirmed the District Court's judgment. Petitioner petitioned the Fourth Circuit Court of Appeals for a rehearing and hearing en banc which were denied on July 10, 2000.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULING ON THE CONSTITUTIONAL DEMAND FOR DUE PROCESS WHEN REMOVING A FEDERAL EMPLOYEE FROM FEDERAL EMPLOYMENT.

Petitioner's petition for writ of certiorari should be granted because the decision below conflicts with this Court's important prior rulings on the importance of due process when depriving an individual of life, liberty or property. Said deprivation must be preceded by notice and opportunity for a hearing appropriate to the case. The due process clause requires some kind of hearing prior to the discharge of an employee who has a constitutionally

protected interest in his employment. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985). As specified in the statement of this case, the SSA's September 2, 1997 actions were a clear removal of Petitioner from his Voorhees, New Jersey Administrative Law Judge position with no intent of his return. Without any prior notice and contrary to the specific instructions in the OPM proposal letter, the SSA removed Petitioner from his position prior to *any* opportunity for Petitioner to respond to the accusations or the OPM's final decision on the matter of his suitability for federal service. When OPM made its final decision on February 12, 1998, OPM in its final decision letter made it known that it was aware that SSA had already removed Petitioner from his Administrative Law Judge position for over five months. OPM's decision to find Petitioner unsuitable and to be removed from his SSA Administrative Law Judge position was a mere OPM endorsement of what OPM knew SSA had already done, contrary to OPM's instructions.

It would be naive to assume SSA's premature unauthorized removal of Petitioner would have no discretionary impact on OPM's final decision. As stated by this Court, "even where the facts are clear, the appropriateness or necessity of the discharge may not be, in such cases, . . . , the only opportunity to invoke the discretion of the decision maker. . . . would likely be before the termination takes effect." *Id.* at 543.

Petitioner duly appealed OPM's final decision and SSA's removal action to the MSPB on February 11, 1998 and SSA's removal action again on March 31, 1998. The MSPB totally disregarded all its statutory and regulatory due process procedural responsibilities and summarily endorsed the SSA and OPM's disciplinary actions.

Firstly, the MSPB ignored its regulatory due process procedure afforded by 5 C.F.R. § 1201.140. 5 C.F.R. § 1201.140 specifically states ". . . [A MSPB] administrative law judge will hear an action brought by an employing agency under this subpart against a respondent administrative law judge. . .". Contrary to the mandate of 5 C.F.R. § 1201.140, the MSPB, for some unknown reason, assigned both Petitioner's appeals to a regional administrative judge (AJ) for adjudication. Despite several Petitioner's requests to the MSPB to have Petitioners appeals heard by a MSPB Administrative Law Judge, pursuant to 5 C.F.R. § 1201.140, all Petitioner's requests were arbitrarily and capriciously denied by the MSPB.

Secondly, the AJ was either unfamiliar with or refused to comply with the MSPB disciplinary due process procedure afforded Petitioner pursuant to 5 U.S.C. § 7521, 5 C.F.R. §§ 1201.137 and 1201.142 in regard to both Petitioner's SSA appeals. The MSPB totally disregarded Petitioner's first SSA appeal and dismissed the second SSA appeal for lack of MSPB subject matter jurisdiction.

Disciplinary actions taken against an Administrative Law Judge by employing Federal administrative agencies are subject to the provisions of 5 U.S.C. § 7521. 5 U.S.C. § 7521 specifically states :

> . . . An action may be taken against an administrative law judge . . . by the agency in which the administrative law judge is employed only for a good cause established and determined by the Merit Systems Protection Board on the record after opportunity for a hearing before the Board . . . actions covered by this section are . . . a removal; . . . a suspension; . . .

Likewise, the MSPB's own regulations themselves reiterates the specifics of the agency due process procedures in a disciplinary action to be initiated against an Administrative Law Judge. 5 C.F.R. §§ 1201.137 and 1201.142 specifically grants MSPB, jurisdiction over SSA's removal/ suspension action, pursuant to 5 U.S.C. § 7521. It is clear from the case facts that the SSA's removal action against Petitioner were taken without required statutory and regulatory disciplinary due process and established MSPB reviewable case law.

SSA's removal action, whether deemed indefinite suspension or indefinite enforced leave ". . . is tantamount to depriving the worker of his job . . ." and is a disciplinary action reviewable by the MSPB. *Pittman v. Merit Systems Protection Board*, 832 F.2d 598, 600 (Fed. Cir. 1987). *See also Mercer v. Department of Health and Human Services*, 772 F.2d 856, 858 (Fed. Cir. 1985). Likewise, established MSPB case law reviews the SSA's indefinite suspension of Petitioner, without any prior notice, opportunity to respond or condition subsequent as a fundamentally denied disciplinary due process afforded all federal employees. *Engadbl v. Department of the Navy*, 900 F.2d 1572, 1575 (Fed. Cir. 1990); *Jones v. Department of Army*, 68 MSPB 398, 399 (1995).

Finally, the SSA's September 2, 1997 premature disciplinary removal of Petitioner from his Administrative Law Judge position, as tolerated by the OPM and endorsed by the MSPB, has prejudiced any subsequent federal administrative processing of this case and must be overturned and stricken by this court as such. The District and Appellate Courts are in clear error to disregard denied fundamental constitutional, statutory and regulatory due process disciplinary procedures afforded Petitioner as an Administrative Law Judge and federal employee.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT, THE FEDERAL CIRCUIT AND THE FOURTH CIRCUIT'S PRIOR RULINGS ON THE IMPORTANCE OF A DUE PROCESS TRIAL *DE NOVO* WHEN AN ADMINISTRATIVE MSPB DISCRIMINATION CASE IS APPEALED TO A FEDERAL DISTRICT COURT.

Petitioner's petition for writ of certiorari should likewise be granted on this question to this Court because the District Court decision below is in clear conflict with established prior rulings by this Court, the Federal Circuit Court of Appeals and the Fourth Circuit Court of Appeals itself.

The District Courts action to dismiss Petitioner's MSPB discriminatory charges, based upon the administrative record, is clearly erroneous and unprecedented. Pursuant to 5 U.S.C. § 7703, the only reason why the review jurisdiction of this appealed MSPB case was before the District Court of Maryland, instead of the Federal Circuit Court of Appeals is because MSPB mixed discrimination issues were also appealed. 5 U.S.C. § 7703, requires Petitioner's mixed MSPB discrimination issues to be heard by trial *de novo* in an appropriate United States District Court. Regardless of the administrative record in this case, the District Court is statutorily mandated to hear the MSPB appealed discrimination issues by trial *de novo*. *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Rana v. United States of America*, 812 F.2d 887, 890 (4th Cir. 1987); *Hayes v. United States Government Printing Office*, 684 F.2d 137, 139 (Fed. Cir. 1982).

The District Court denied Petitioner a due process trial *de novo* factual opportunity to prove both the SSA's premature disciplinary actions and the OPM's subsequent final finding and severe maximum discipline against Petitioner were related, unfounded and a mere pretext for discriminatory motives.

Throughout the entire MSPB administrative procedure, Petitioner objected on the record to the MSPB refusal to allow petitioner to question the OPM deciding official on the substance of the unsuitability determination as well as the unique per se discriminatory requirement OPM imposed upon Petitioner, contrary to OPM's own discriminatory policy. Likewise, on the record, Petitioner persistently objected to the MSPB's protection of the SSA from any responsible explanation for its disciplinary actions. The MSPB refused to even acknowledge Petitioner's first SSA removal appeal and dismissed the second indefinite suspension and due process discrimination appeal for lack of MSPB subject matter jurisdiction.

In essence, the District Court's due process denial of the *de novo* trial on the discrimination issues mirrors the same due process problems Petitioner experienced at the administrative level. If this Court refuses to grant the petition on this issue, well established precedent by this Court and the Circuit Courts will have been ignored and rendered moot by all District Courts. Furthermore, Petitioner will be left without a due process forum to hear Petitioner's federal discrimination case.

CONCLUSION

This case presents questions of exceptional importance — whether a federal employee is entitled to statutory and regulatory due process when being disciplined by an employing administrative agency. Furthermore, whether a Federal District Court can ignore the statutory due process mandate of a trial *de novo* in an appealed MSPB mixed discrimination case. Petitioner will have been denied fundamental due process and will forever suffer in future employment if these administrative and Federal Court decisions are allowed to stand. By granting Petitioner's petition for certiorari, this Court can correct any federal administrative agency's perception that federal statutory and regulatory due process disciplinary procedures are discretionary and can be arbitrarily and capriciously adhered on a case by case basis. Likewise, this Court can correct the District Court of Maryland and the Fourth Circuit Court of Appeals' unprecedented rulings that Petitioner's statutory due process right to a trial *de novo*, in an appealed MSPB mixed discrimination case, is discretionary and can be ignored arbitrarily and capriciously by any federal District Court, on a case by case basis.

Accordingly, Petitioner respectfully request this Court to call for an exercise of its supervisory power to correct all lower administrative and federal court decisions, so far departed from the usual course of due process judicial proceedings, denied in this specific case.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED MARCH 30, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1035

REGINALD L. SYDNOR,

Plaintiff – Appellant,

v.

JANICE LACHANCE, Head of the Office of Personnel Management; KENNETH S. APFEL, Secretary, Department of Health and Human Services, Commissioner, Social Security Administration,

Defendants – Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, Chief District Judge. (CA-99-228-JFM)

Submitted: March 23, 2000 Decided: March 30, 2000

Before LUTTIG, WILLIAMS, and MICHAEL, Circuit Judges.

* * *

Appendix A

PER CURIAM:

Reginald L. Sydnor appeals from the district court's order dismissing his civil action. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. *See Sydnor v. LaChance*, No. CA-99-228-JFM (D. Md. Oct. 27, 1999). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED OCTOBER 25, 1999 AND FILED OCTOBER 26, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-99-228

REGINALD L. SYDNOR

v.

JANICE R. LACHANCE, ET AL.

MEMORANDUM

Plaintiff was hired as an Administrative Law Judge ("ALJ") with the Office of Hearings and Appeals of the Social Security Administration ("SSA"). After plaintiff was hired, the Office of Personnel Management ("OPM") conducted a background investigation of him and determined that he had made material misrepresentations on his employment application and related forms. OPM found plaintiff unsuitable for federal employment, ordered his removal from office, and debarred him from federal employment for three years. After OPM rendered its decision, SSA placed plaintiff on indefinite suspension without pay.

Plaintiff filed an appeal to the Merit Systems Protection Board ("MSPB"). The MSPB affirmed the actions taken by OPM and SSA.

Appendix B

In the present action plaintiff alleges that the actions taken by SSA were racially discriminatory and in violation of the Title VII of the Civil Rights Act of 1964. He also alleges that the background investigation conducted by OPM, which included inquiries regarding plaintiff's previous receipt of worker's compensation and disability payments, was in violation of the Rehabilitation Act. Finally, plaintiff alleges procedural defects with the MSPB's decision.

Defendants have filed a motion to dismiss or for summary judgment. The motion will be treated as one for summary judgment and, as such, will be granted.

Plaintiff's claims are frivolous. There was ample evidence (which plaintiff does not contradict) to demonstrate that he made several material misrepresentations in his employment application and related documents. He indicated on one of those documents that he was self-employed as an attorney in private practice from August 1993 to March 1997 while on another form he indicated he was unemployed during the period. He indicated that he had never been fired from any previous position, that he had never quit after being told that he would be fired, and that he left a previous job by mutual agreement because of specific problems. OPM's investigation revealed that the facts surrounding plaintiff's separation from his prior employment with the EEOC should have been provided in response to this inquiry. Plaintiff also falsely stated the name of his immediate supervisor with the EEOC. Finally, be failed to disclose worker's compensation and disability retirement payments in response to questions seeking to elicit information about such payments.

Appendix B

On this record plaintiff clearly was unsuitable to serve as an ALJ for the SSA. He was found not to have told the truth when applying for employment. As the MSPB ruled, the SSA was not responsible for the termination of plaintiff's employment since the Civil Service rules delegate to OPM the legal authority to conduct investigations, determine the fitness of applicants or appointees, and order an agency to separate an employee found unsuitable for employment. As to OPM, the mere fact that it makes inquiries into whether an applicant has previously received worker's compensation benefits or disability benefits does not itself violate the Rehabilitation Act. Moreover, even assuming that such inquiries are unlawful, this would not give plaintiff a license to lie in responding to them or justify the misrepresentations he made about other matters material to his employment.

A separate order entering judgment on behalf of defendants is being entered herewith.

Date: October 25, 1999

s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD DATED DECEMBER 30, 1998

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBERS
PH-0731-98-0188-I-1
PH-0752-98-0213-I-1

REGINALD L. SYDNOR,

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

and

SOCIAL SECURITY ADMINISTRATION,

Agencies.

DATE: DEC 30 1998

* * *

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Appendix C

ORDER

After full consideration, we join these appeals for adjudication pursuant to 5 C.F.R. §§ 1201.36(a)(2) and 1201.117(a)(5), and we DENY the appellant's petitions for review of the initial decisions issued on June 3, 1998 and June 11, 1998, because they do not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeals. The initial decisions in these appeals are now final. 5 C.F.R. § 1201.113(b).

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS IN APPEAL
PH-0731-98-0188-I-1

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

Appendix C

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

Appendix C

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS IN APPEAL
PH-0752-98-0213-I-1

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: s/ Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX D — INITIAL DECISION OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD, WASHINGTON REGIONAL OFFICE DATED JUNE 11, 1998

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBER
PH-0731-98-0188-I-1

REGINALD L. SYDNOR,

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Agency.

DATE: JUN 11 1998

* * *

BEFORE

Sherry A. Armstrong
Administrative Judge

INITIAL DECISION

Appendix D

INTRODUCTION

On February 11, 1998, the appellant filed a timely appeal from the January 13, 1998, decision by the Office of Personnel Management (OPM or agency) which found, *inter alia*, that the appellant was unsuitable for Federal employment and directed his employing agency, the Social Security Administration (SSA), to effect his removal from the position of Administrative Law Judge, AL-0935-03. The Board has jurisdiction over this appeal. *See* 5 U.S.C. § 7701(a); 5 C.F.R. § 731.103(d). For the reasons set forth below, the agency's action is AFFIRMED.

BACKGROUND

The following information is undisputed: Effective March 2, 1997, the appellant was appointed to the position of Administrative Law Judge (ALJ), AL-0935-03, at the Social Security Administration (SSA), Office of Hearings and Appeals, in Voorhees, New Jersey. Pursuant to the regulations governing ALJ appointments, the appointment was subject to a background investigation in accordance with 5 C.F.R. §§ 731.201 through 731.303. *See* 5 C.F.R. § 930.203a. Accordingly, on March 20, 1997, the appellant signed an "Authorization for Release of Information" permitting any investigator, agent, or representative of the agency authorized to conduct the background investigation to obtain the necessary information and to disclose it to the requesting agency for the purpose of making a suitability determination. Ag. File, Tab 2L. It also authorized custodians of records and other sources of information to release such information upon request of the investigator regardless of any previous agreement to the contrary. *Id.*

Appendix D

On January 13, 1998, the Office of Personnel Management found that, based on its investigation, its proposal, and the appellant's reply, the appellant was unsuitable for Federal employment and directed SSA to effect his removal. Ag. File, Tab 2A. It further canceled any eligibilities that the appellant may have on competitive registers, canceled any pending applications, and debarred the appellant from competition or appointment to any position in the competitive Federal service for three years. *Id.* The agency's decision was based on the charge of intentional falsification of an application and related forms during the appointment process.[1] *Id.*

OPM's determination is based on allegations of false information provided on employing documents, including the appellant's SF-171, Application for Federal Employment, the SF-85P, Questionnaire for Public Trust Positions; and Optional Form 306, Declaration for Federal Employment. *Id.* OPM alleged that discrepancies existed regarding the appellant's prior self-employment as an attorney, the cessation of his employment with the Equal Employment Opportunity Commission (EEOC), identification of the appellant's supervisors at EEOC, and non-disclosure of benefits provided by the Office of Workers' Compensation Programs (OWCP) and a disability retirement pension. *Id.* The specifications of each allegations are discussed below.

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1. In its initial proposal, the agency proposed a charge based on allegations of criminal or dishonest conduct. Ag. File, Tab 2H. However, in its final decision dated January 13, 1998, OPM determined that there was insufficient evidence to support this charge and it was dismissed from consideration. Ag. File, Tab 2A.

Appendix D

The appellant denies OPM's findings that he intentionally falsified information on the documentation in question. He further contends that OPM's action was the result of violations of law, disability discrimination, and harmful procedural error. The appellant also asserts that this regional office is without jurisdiction to hear this appeal based on his argument that, as an ALJ, he is entitled to the procedural protections provided in 5 U.S.C. § 7521.

ANALYSIS AND FINDINGS

Legal Standard

In a negative suitability determination, OPM must demonstrate by preponderant evidence a pattern of conduct that is incompatible with successful performance in the position at issue or that would interfere with or prevent the employing agency from effectively performing its mission. *Jackson v. Office of Personnel Management*, 39 M.S.P.R. 279, 283 (1988). Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

To sustain its charge of falsification, the agency must prove by preponderant evidence that the appellant knowingly supplied incorrect information with the specific intent of defrauding, deceiving, or misleading the agency. *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986); *Futrell v. Department of Justice*, 57 M.S.P.R. 640, 643 (1993), *aff'd in part, rev'd in part*, 31 F.3d 1177

(Fed. Cir. 1994) (Table). A showing that the supplied information was incorrect is not sufficient alone to sustain the charge, and plausible explanations must be considered. *See Kuhn v. Federal Deposit Insurance Corporation*, 48 M.S.P.R. 393, 395-96 (1991), *aff'd*, 954 F.2d 734 (Fed. Cir. 1992) (Table). However, intent may be established by circumstantial evidence and may also be inferred when a misrepresentation is made with a reckless disregard for the truth or with a conscious purpose to avoid learning the truth. *See Harmon v. General Services Administration*, 61 M.S.P.R. 327, 330, *aff'd*, 47 F.3d 1181 (Fed. Cir. 1995) (Table). The agency need not show that it detrimentally relied on the intentionally falsified information provided by an appellant. *Wayne v. Department of the Navy*, 55 M.S.P.R. 322, 329 (1992).

Finally, the agency must also prove by preponderant evidence that there is a nexus between the alleged falsification and the efficiency of the service, and that its negative suitability determination action was reasonable. *See Kissner v. Office of Personnel Management*, 792 F.2d 133, 134 (Fed. Cir. 1986); *Futrell*, 57 M.S.P.R. at 646-47.

In seeking review of OPM's negative suitability determination, the appellant is not entitled to the procedural protections provided by 5 U.S.C. § 7521.

The appellant contends that this appeal of OPM's negative suitability determination is not properly within the jurisdiction of this regional office. AF, Tabs 8, 18, and 25. He asserts that, as an ALJ, he is entitled to the procedural protections afforded by 5 U.S.C. § 7521. *Id.* I disagree.

Appendix D

Applicable statutes and regulations provide an ALJ with additional procedural protections for designated actions. *See* 5 U.S.C. § 7521; 5 C.F.R. § 930.214(a). In certain cases, adverse actions against an ALJ may only be taken for good cause shown after an opportunity for hearing before another ALJ. *Id.* However, such cases are limited to those involving removal, suspension, reduction in grade or pay, or furlough for 30 days or less. *Id.* An appeal of a negative suitability determination is not included in the list of actions subject to 5 U.S.C. § 7521. *Id.*

Nonetheless, the appellant asserts that, because OPM found him unsuitable and ordered his removal from SSA, the action should be taken pursuant to 5 U.S.C. § 7521. However, even assuming, *arguendo,* that this appeal could be characterized as a removal action, the result would be the same.

The President has the statutory authority to prescribe regulations which, *inter alia*, determine the fitness of applicants and appointees for Federal employment. 5 U.S.C. § 3301. Pursuant to authority provided in 5 U.S.C. § 1104, the President delegated the authority for personnel management functions to the Director of OPM. 44 Fed. Reg. 1055 (1978), as codified at 5 U.S.C. § 1103. Thus, OPM has the broad authority to execute, administer, and enforce civil service rules and regulations. *See Gaxiola v. Department of the Air Force,* 6 M.S.P.R. 515, 519 (1981). Accordingly, acting within its delegated authority, OPM promulgated regulations governing suitability determinations as well as regulations governing the appointment and removal of an ALJ. *See* 5 C.F.R. Parts 731 and 930, Subpart B. The

regulations provide an express exception to 7521 procedures in actions involving a suitability determination of an ALJ. OPM's regulations specifically state that the procedural protections afforded an ALJ by 7521 "do not apply in making dismissals or taking other actions requested by OPM under §§ 5.2 and 5.3 of this chapter. . ." 5 C.F.R. § 930.214(c). The cited provisions are two of the civil service rules on which the statutory and regulatory framework of the civil service system is founded. 5 C.F.R. § 5.2 provides OPM with the authority to investigate the qualifications and suitability of applicants for positions in the competitive service. 5 C.F.R. § 5.3 grants OPM the authority to instruct an agency to separate or take other action against an employee serving an appointment when OPM finds that the employee is disqualified for Federal employment. OPM has express authority to instruct the employing agency as to whether or not the employee should remain on duty and continue to receive pay pending adjudication of the appeal. 5 C.F.R. § 5.3. As the Board has previously held, OPM has authority pursuant to 5 C.F.R. § 5.3 to correct an erroneous qualification determination of an employee by directing the appropriate agency to take the necessary action. *See Post v. Office of Personnel Management,* 27 M.S.P.R. 572, 575 (1985).

In sum, pursuant to 5 C.F.R. §§ 5.2 and 5.3, OPM has the delegated legal authority to conduct investigations, determine the fitness of applicants or appointees, and order an agency to separate an employee found unsuitable for employment. OPM has expressly provided that an action taken against an ALJ pursuant to these regulatory provisions are excepted from the procedural protections otherwise

provided. 5 C.F.R. § 930.214(c). Consequently, despite the fact that the appellant is an ALJ, he has no entitlement to the additional procedural protections afforded to an ALJ in designated actions pursuant to 5 U.S.C. § 7521.

OPM established by preponderant evidence that the appellant provided false information on employment documents.

Self-employment

On the form SF-85P, Questionnaire for Public Trust Positions (SF-85P), dated March 20, 1997, the appellant indicated that he was self-employed as an attorney in private practice from August 1993 to the present (March 1997). Ag. File, Tab 2L. This information was not provided on the SF-171, Application for Federal Employment (SF-171) dated July 1, 1993. Ag. File, Tab 2L.[2] Rather, on that form for the specified period of August 20, 1993, to present (December 12, 1993),[3] the appellant indicated that he was "unemployed." *Id.* OPM noted this as a discrepancy in its decision finding the appellant unsuitable for Federal employment. Ag. File, Tab 2A.

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2. This form is also located in the agency file at tab 2N but the signature page is missing. Thus, all references will be to the copy of the SF-171 contained under tab 2L, with the exception of the attachments to the SF-171 which may only be found at Ag. File, Tab 2N.

3. Although the SF-171 was dated July 1, 1993, on the page on which he indicated he was unemployed, the appellant had separately signed and dated that page with the date of December 12, 1993. Ag. File, Tab 2L.

Appendix D

In his response to OPM's proposed negative suitability determination, the appellant stated that he was "basically unemployed" although he did work for a local law firm on an infrequent basis. Ag. File, Tab 2C. He stated that, as his work was sporadic prior to November of 1995, he did not consider himself self-employed for reporting purposes until that time. *Id.*

At the hearing, the appellant testified that he was self-employed as an attorney from August 1993 through the time of his appointment to SSA in early 1997 and that he received limited compensation for the work that he completed. He testified that the reason that the SF-171 stated that he was unemployed was because he completed that form in July of 1993 and, at that time, he was still employed with the EEOC. Additionally, he testified that he considered "unemployment" and "self-employment" to be the same thing and that it was not inconsistent to say that he was unemployed on one form and self-employed on another form. Finally, the appellant testified that, during the time period in question, he performed some work on a contingency basis for a local law firm, Harper and Polk, in Germantown, Pennsylvania. This information was not disclosed on either form.[4]

I do not find credible the appellant's explanation for the omission of the information regarding his self-employment

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4. While the appellant's work at a law firm should also have been disclosed on the applicable forms, OPM's allegations do not specify the appellant's failure to do so as grounds for its decision. Consequently, it is not being considered herein as to the merits of this appeal.

on the SF-171. It is true that the date provided on the last page of the SF-171, beside the appellant's signature, was July 1, 1993. Ag. File, Tab 2L. However, the page on which the appellant indicated he was unemployed for the period of "8/20/93 to present" contains a separate signature by the appellant with a handwritten date of "12/12/93." Further, while the appellant indicated in one section that his unemployment was through the "present," in a separate box, requesting the applicant to provide the "date completed" for that employment segment, the appellant specified "11/30/93." Consequently, the appellant obviously updated the form subsequent to the date that he initially signed it at the end. As noted above, the appellant provided on the SF-85P that he was in "private practice" from August 1993 to March 1997, and he testified at hearing that he was self-employed since August 1993, and that he performed work for a local law firm subsequent to his termination from EEOC. Nonetheless, he still indicated on the SF-171 that he was "unemployed." Therefore, I find that the appellant provided false information on the SF-171.

Further, I find completely implausible the appellant's assertion that he believed "unemployment" and "self-employment" to be the same and that it was not inconsistent to indicate self-employment on one form and unemployment on the other. The appellant is an educated attorney with extensive experience in Federal agencies with personnel law. The position descriptions he provided for prior positions indicates that the appellant had extensive knowledge of civil service rules and regulations and he specifically testified that he was required to have extensive knowledge of personnel and employment law. *See, e.g.,* Ag.

File, Tab 2N, Attachment B. Further, the average layman would know based on common sense that self-employment and unemployment are not the same. It is patently incredible that the appellant believed that they were synonymous when he completed the documents in question.

Cessation of EEOC employment

On all three forms in question, the appellant indicated that he had never been fired from any previous position, nor had he quit after being told he would be fired or left a previous job by mutual agreement because of specific problems. *See* Ag. File, Tabs 2L and 2M. OPM found this information to be erroneous. Ag. File, Tab 2A.

It is undisputed that, on June 24, 1993, the EEOC proposed the appellant's removal from the position of Supervisory Trial Attorney, GM-905-14, for "unavailability to perform the duties of [his] position." Ag. File, Tab 2L. After the appellant's reply, the proposed removal was upheld by decision dated August 18, 1993. *Id.* The appellant subsequently filed an appeal with the Merit Systems Protection Board, Philadelphia Regional Office, which was resolved by settlement agreement dated November 17, 1993. *Id.* The settlement agreement did not alter the status of the appellant's removal action. *Id.* Consequently, the appellant was previously removed from Federal employment effective August 20, 1993, based on his "unavailability to perform the duties of [his] position." *Id.*

In his response to OPM's proposed negative suitability determination, the appellant asserted that he did not disclose

this information because his "termination from the EEOC had nothing to do with any of the [stated] reasons" but, rather, it was based on his physical inability to perform the duties of his position. Ag. File, Tab 2C. At hearing, the appellant testified that he did consider his termination from the EEOC to be involuntary. Further, it is undisputed that he appealed the removal to the MSPB. The appellant testified that he did so because he believed that he should have been able to remain on the agency's roles for a longer period and because the agency had acted in retaliation for his worker's compensation claim.

On all three forms in question, the appellant was asked whether he had been removed from any job. Ag. File, Tabs 2L, and 2M. The appellant answered negatively on all three forms.[5] On none of the forms was there any exception based on the cause of the removal and, in fact, the SF 85-P and the OF-306 specifically asked about removals "for any reason." *Id.* It is undisputed that the EEOC proposed and effected the appellant's involuntary removal based on his inability to perform the duties of his position. Thus, his negative response on all three forms regarding removal was erroneous. I find that the appellant's explanation, that he was not required to disclose his involuntary removal from the EEOC because of the underlying reason, fails to justify his failure to answer truthfully on the relevant documents that he was, in fact, removed from the EEOC. Thus, I find that the appellant

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5. I note that the SF-171 was dated July 1, 1993, and, as of that time, the appellant had not been removed. Ag. File, Tab 2L. However, as discussed at length above, it is obvious that the appellant updated the form subsequent to its initial completion. *Id.*

provided false information regarding his termination from the EEOC on all three cited documents.

EEOC supervisors

On the SF-171, the appellant indicated that he was employed at the EEOC as a supervisory trial attorney from March 30, 1990, until August 20, 1993, and designated his immediate supervisor as Issie Jenkins. Ag. File, Tab 2L. On the SF-85P, the appellant indicated that he worked for the EEOC from September 1978 through August 1993 and that his supervisor was Spencer Lewis. *Id.* In its investigation, OPM found no evidence that Mr. Lewis was ever the appellant's supervisor. Ag. File, Tab 2A. It is undisputed that, at the time of his termination from the EEOC in August of 1993, the appellant's first line supervisor was Deborah Floyd. AF, Tab 27. OPM's investigation revealed that Ms. Jenkins had not been the appellant's supervisor since at least October of 1991 because his last performance appraisal for 1991-1992 was signed by Deborah Floyd. AF, Tab 1, Exhibit G. Further, the only evidence that Mr. Lewis was ever the appellant's supervisor was the appellant's provision on the attachment to his SF-171 that Mr. Lewis had been his supervisor from October 31, 1983, through September 30, 1988. Ag. File, Tab 2N.

In his response to OPM, the appellant asserted that he provided Ms. Jenkins on the SF-171 because, "while [she] was not [the appellant's] last supervisor, she was [his] last supervisor at the EEOC who [he] trusted to give truthful answers." Ag. File, Tab 2C. At hearing, he testified that he named Ms. Jenkins because she was his supervisor during

the predominant part of his employment with EEOC and that he provided Mr. Lewis' name on the SF-85P because Mr. Lewis was a previous supervisor and the form did not specify that it was to be the name of the last supervisor. In regard to Mr. Lewis, the appellant relied heavily on the statement of another ALJ, Jacqueline Bulluck, as evidence that Mr. Lewis had once been his supervisor. Ag. File, Tabs 2I and 2K.

I find the appellant's explanations regarding Ms. Jenkins and Mr. Lewis to be disingenuous. It is illogical that, on an employment document asking for your immediate supervisor, an applicant would expect that specifying a supervisor from as much as two to five years prior would provide a truthful answer. Further, the appellant indicated an intent to deceive in regard to Ms. Jenkins because, as he conceded in his written reply to OPM, he believed other supervisors would not give answers he considered to be truthful. Ag. File, Tab 2C. Further, the only documentary evidence that Mr. Lewis ever supervised the appellant is the appellant's statement on the SF-171 and the appellant has proven to be less than credible throughout this matter. Although he references forms in the agency's file on which Mr. Lewis' signature may be found, he did not specify any form on which Mr. Lewis is specified as his immediate supervisor. Contrary to the appellant's assertion, Judge Bulluck's statement does not provide the necessary evidence. She provides that she knew the appellant only as a professional colleague with whom she had only "passing, incidental contact." Ag. File, Tabs 2I and 2K. She stated that, to the best of her knowledge and recollection, the appellant reported to various supervisors including Ms. Jenkins and Mr. Lewis, but she does not provide any dates and, in addition, she specifies Mr. Lewis

as the appellant's second-line supervisor, not an immediate supervisor. *Id.* Regardless, it is undisputed that neither Ms. Jenkins nor Mr. Lewis were the appellant's most recent supervisors. Consequently, for all of these reasons, I find that the agency has proven its charge of providing false information in regard to the appellant's supervisors at EEOC.

OWCP benefits and disability retirement

The final issue concerns the appellant's alleged non-disclosure of OWCP benefits and a disability retirement pension. On the SF-171 and the OF-306, the appellant responded in the negative to the following question: "Do you receive, or have you ever applied for retirement pay, pension, or other pay based on military, Federal civilian, or District of Columbia government service?" Ag. File, Tabs 2L and 2M. It is undisputed that the appellant had received both OWCP and disability retirement pay.

In his written reply to OPM's proposal notice, the appellant admitted that he stopped performing duties at the EEOC on August 21, 1992, because his claim for workers' compensation benefits had been approved. Ag. File, Tab 2C. He provided that he received benefits totaling over $75,000 for the time period of December 11, 1992, to August 4, 1994. *Id.* He further verified that his application for disability retirement had been approved August 5, 1994, and continued until his appointment with SSA. *Id.*

The appellant failed to disclose the OWCP benefits or disability retirement in response to item number 14 on the OF-306 nor did he disclose the OWCP benefits in response

to item 46 of the SF-171. In his response to OPM and during this proceeding, the appellant argued that he did not provide the information on the forms in question because they did not specifically list OWCP benefits or disability retirement and because the requirement of such information would violate the Rehabilitation Act.[6] Ag. File, Tab 2C. Before the Board, the appellant also asserted that he did not receive disability retirement based on his government service but that it was based on his disability.

I find the appellant's explanations do not justify the erroneous information provided. The appellant has failed to establish that the requested information is illegal. OPM accurately provided in its proposal that such information should have been disclosed, especially when applying for a position as an ALJ, because agencies must verify that no potential conflicts of interest exist. While the appellant asserted in his written reply that no conflict existed with these benefits and his ALJ position at SSA, that must be determined by the appointing agency based on a full disclosure of information.

As the appellant correctly notes, the question on each of the forms does not specify OWCP or disability retirement benefits. However, they both specifically request information about "other pay based on . . . Federal civilian . . . service" as well as "retirement pay." Ag. File, Tabs 2L and 2M.

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6. The appellant argued to OPM and the Board that the requirement of such information is illegal as it violates applicable disability law. This argument will be addressed below in regard to the appellant's affirmative defenses.

Clearly, the appellant received OWCP and disability retirement benefits based on his Federal service as the Department of Labor and OPM award such benefits only to those individuals who meet the qualifying criteria based on government service. Further, in regard to the disability pension, the appellant applied for and received disability retirement and, thus, his argument that it was not a form of retirement is nonsensical. Finally, I find the appellant's explanation that he did not disclose the information because the benefits he received were based on his disability, not on federal employment, to be completely without merit. Clearly, such benefits were made available to him because of his tenure with the Federal government and would not have been available to anyone based solely on a disabling condition. Such an argument is equivalent to asserting that a Federal employee retiring on a regular pension does not receive benefits based on Federal service but, instead, based on age alone. Obviously, such an assertion would be ridiculous. I find the appellant's explanations equally incredible. Thus, I find that the appellant provided false information about OWCP benefits and disability retirement pension on the OF-306 and false information about OWCP benefits on the SF-171.

The agency's negative suitability determination is sustained.

The agency has established by preponderant evidence that the appellant provided false information on the forms in question regarding prior self-employment, the cessation of his employment at EEOC, his supervisors at EEOC, and the receipt of OWCP and disability retirement benefits.

However, as noted above, a showing that the supplied information was incorrect is not sufficient alone to sustain the charge. *See Kuhn,* 48 M.S.P.R. at 395-96. The agency must prove by preponderant evidence that the appellant knowingly supplied incorrect information with the specific intent of defrauding, deceiving, or misleading the agency. *Naekel,* 782 F.2d at 977; *Reed v. Office of Personnel Management,* 74 M.S.P.R. 616, 620 (1997); *Futrell,* 57 M.S.P.R. at 643.

The appellant asserts that he had no intent to defraud the government in providing the relevant information on the employing documents in question and he contends that OPM has failed to demonstrate such an intent. However, as recognized by the Federal circuit and the Board, the intent to defraud can seldom be determined from direct evidence and, consequently, circumstantial evidence must often be relied upon in establishing such intent. *Naekel,* 782 F.2d at 978; *Forsha v. Office of Personnel Management,* 33 M.S.P.R. 304, 308 (1987). Thus, intent may be established by circumstantial evidence and may also be inferred when a misrepresentation is made with a reckless disregard for the truth or with a conscious purpose to avoid learning the truth. *See Harmon,* 61 M.S.P.R. at 330.

I find that there is sufficient evidence to infer intent in this case. As discussed at length above, the appellant's explanations for the erroneous information provided regarding his self-employment, his termination of employment with EEOC, and his receipt of OWCP and disability retirement benefits are implausible. I did not find the appellant to be a credible witness in that, throughout the

pendency of OPM's investigation and this proceeding, he frequently provided contradictory information and made statements which were wholly self-serving and completely incredible. For instance, in addition to the contradictory statements at issue in this appeal, the appellant's assertion, as discussed above, that he believed self-employment and unemployment to be the same thing was completely unbelievable given the appellant's education, training, and work experience. In response to questioning at hearing regarding a negative performance appraisal at EEOC, he stated that he believed the evaluation was not valid because he did not sign it and stated without supporting authority that failure to do so rendered it invalid. Obviously, if an employee refuses to sign a negative performance appraisal, the appraisal itself is not invalidated. It defies reason that, given the appellant's work experience and supervisory authority, he truly believed this to be an accurate statement. He further testified at hearing that he never objected to the performance appraisal because he intended to raise it during his appeal to the Board. However, his appraisal was issued in December of 1992 and his removal was not even proposed, yet alone appealed, until after June of 1993. He testified during the hearing both that he was compensated for his self-employment efforts and later testified that he did not receive any compensation until after his appointment as an ALJ.

In some of the specifications, even if the appellant did not intend to provide erroneous information, he demonstrated a reckless disregard for the truth. For instance, even if the appellant truly believed that OWCP and disability retirements benefits did not have to be disclosed as payments received

based on his Federal service, he made no efforts to determine if his interpretation of the question was accurate. While he stated at hearing that the information regarding his EEOC supervisors was technically accurate given that the questions did not specify that it had to be the latest supervisor, he made no effort to determine if that would be satisfactory. On no place on any form did he identify who his latest supervisor really was. If he had nothing to conceal, there would no reason to omit that information. The appellant testified that he did not provide his last supervisor because of the settlement agreement entered into between him and EEOC in resolution of his removal appeal. However, that settlement agreement specifically stated that the EEOC would only be responsible for information given out by, *inter alia,* Deborah Floyd, the appellant's last supervisor. Ag. File, Tab 2L. Finally, as discussed above, in his written reply to OPM's proposal, the appellant stated that he provided Ms. Jenkins on the SF-171 because, "while [she] was not [the appellant's] last supervisor, she was [his] last supervisor at the EEOC who [he] trusted to give truthful answers." Ag. File, Tab 2C. This statement evidences the appellant's intent to deceive or defraud the government.

The appellant's motivations for providing erroneous information are not clear. He admitted at hearing that he left the EEOC after a negative performance appraisal and several challenges to his claim for OWCP benefits and it appears likely that his actions in not disclosing certain information could have been an attempt to avoid discovery of the problems which arose at the EEOC. Regardless, the agency does not have to establish the appellant's motivation. It is clear from the evidence that the appellant provided false

information and there is ample evidence to infer an intent to defraud as well as a reckless disregard for the truth.

In a negative suitability determination, the agency must demonstrate a pattern of conduct that is either inconsistent with successful performance in the position at issue or that would interfere with or prevent the employing agency from effectively performing its duties and responsibilities. *Pappas v. Office of Personnel Management,* 76 M.S.P.R. 152, 156 (1997); *Hanker v. Department of the Treasury,* 73 M.S.P.R. 159, 167 (1997). The Board has previously held that an intentional false statement, deception, or fraud in the appointment process forms a basis for finding an appointee unsuitable as falsification goes to the heart of the employer/ employee relationship. *Pappas,* 76 M.S.P.R. at 156; *Futrell,* 57 M.S.P.R. at 646. Further, falsification of employment documents is misconduct from which a nexus between removal and the efficiency of the service is presumed. *Kissner,* 792 F.2d at 134; *Scott v. Department of Justice,* 69 M.S.P.R. 211, 242 (1995), *aff'd,* 99 F.3d 1160 (Fed. Cir. 1996) (Table). Finally, the position at issue is that of an ALJ. In such a position, the appellant's credibility must be beyond reproach as his performance would be subject to much public scrutiny. The appellant's falsifications of the documents in question cast grave doubts on his honesty and fitness for employment in a high-level position such as that of an ALJ. *See Morderosian v. Office of Personnel Management,* 42 M.S.P.R. 371, 374-75 (1989). For all the above reasons, I find that the agency's negative suitability determination is supported by preponderant evidence and promotes the efficiency of the service.

Appendix D

As noted above, OPM ordered the appellant's removal from Federal employment, canceled any eligibilities the appellant may have had on competitive registers as well as any pending employment applications, and debarred the appellant from competition for, or appointment to, any position in the Federal competitive service until January 13, 2001. Ag. File, Tab 2A. The appellant asserted that, if the charges were sustained, the penalty was excessive and should be mitigated. In support of his argument, he maintains that he had no performance problems at the SSA but such a consideration is immaterial in evaluating a penalty for pre-employment misconduct. *Reed,* 74 M.S.P.R. at 622; *DeAngelis v. Office of Personnel Management,* 28 M.S.P.R. 456, 458 (1985).

As noted above, falsification of employment documents is a serious offense, especially for an experienced attorney seeking a position of public trust as an ALJ. The Board has repeatedly found a nexus between such an offense and removal from the Federal service. *Kissner,* 792 F.2d at 134; *Scott,* 69 M.S.P.R. at 242. Finally, the appellant has demonstrated no rehabilitation potential based on the false and incredible explanations that he provided for his conduct. *See Morderosian,* 42 M.S.P.R. at 374-75.

The appellant has failed to establish any of his affirmative defenses by preponderant evidence.

The appellant contends that OPM's action was the result of violations of law, disability discrimination, and harmful procedural error. It is the appellant's burden to establish his affirmative defenses by preponderant evidence. I note that

the appellant provided no evidence regarding his alleged affirmative defenses in the hearing and, thus, they are being decided solely on the written record.

Disability Discrimination

The appellant alleges that the motivating factor for the agency's action was disability discrimination. AF, Tabs 19 and 21. An individual may establish discrimination by direct evidence by showing that membership in a protected category was a "motivating factor" in the action appealed. *See Jones v. Department of the Army,* 68 M.S.P.R. 398, 403 (1995). The appellant's sole evidence for his assertion is OPM's statement in the final decision referencing a potential conflict of interest in his work at SSA based on his receipt of disability benefits and experiences with worker's compensation. *Id.* However, there are genuine conflicts of interest which do arise in employment situations and which do not necessarily evidence any discriminatory intent. The appellant's bare assertion is alone insufficient to establish that OPM's motivating factor in finding him unsuitable for employment was discrimination.

Harmful Procedural Error

To establish the affirmative defense of harmful procedural error, the appellant must establish by a preponderance of the evidence that agency committed one or more procedural errors and that the alleged errors were harmful, i.e., that the error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of an error. 5 C.F.R.

§ 1201.56(c)(3). *See, e.g., Bowden v. Department of the Army,* 59 M.S.P.R. 662 (1993). The appellant contends that OPM committed harmful procedural error by basing its determination on erroneous information derived from Johnnie Butler, his second-line supervisor at EEOC, and Barbara Elman, a personnelist at EEOC. AF, Tab 19. He contends that OPM erred by improperly considering information precluded from disclosure by a prior settlement agreement and by not reviewing his "EEOC Official Personnel File" prior to rendering its decision but instead relying on an "unofficial and incomplete file along with a miscellaneous file." *Id.* However, in all these allegations, the appellant fails to specify a procedure which he was entitled to have followed but which was violated nor did he present any evidence as to how the outcome would have been different.

The appellant further asserts that the agency's action was in violation of the Privacy Act, 5 U.S.C. § 522a(g)(1)(c). *Id.* I note that this provision is inapplicable to this proceeding as it governs civil remedies when incomplete information renders an agency determination unfair. Further, the appellant does not specify what information was omitted nor how this omitted information would have affected the agency's decision.

The appellant also asserts that he should have been provided the opportunity to make a written reply prior to the agency's proposal notice. AF, Tabs 19 and 21. He cites no authority for this assertion and it is undisputed that he was provided the opportunity to submit a detailed written response on each of OPM's allegations prior to the final

decision being rendered. Ag. File, Tabs 2C and 2H. Finally, the appellant asserts that OPM violated 5 C.F.R. § 731.402 by failing to advise him of his right to an oral reply in its decision letter. *Id.* OPM contends that he had no such right as he was treated as an "applicant" in that he had less than one year of employment. Regardless of whether the appellant should have been given the opportunity to make an oral reply, he failed to provide a scintilla of evidence to establish how the outcome would have been altered. He provided a detailed reply to the agency's proposal notice and offered no evidence or argument as to what else could have been provided in an oral reply. Thus, I find it unnecessary to determine whether or not the appellant had the right to make an oral reply.

In sum, there is no evidence that the agency committed any harmful procedural errors in its suitability determination.

Violations of law

The appellant argued, both before OPM and the Board, that OPM's requirement that he disclose receipt of OWCP and disability retirement benefits violated applicable disability law found in the Rehabilitation Act, 29 U.S.C. § 791, OPM's regulations found at 5 C.F.R. § 900, et seq., and EEOC's Guidelines on Pre-employment Inquiries (EEOC Notice 915.002, May 19, 1994). AF, Tabs 19 and 28. Other than his bare assertion and a copy of the law, the appellant presented no evidence or argument on this issue. Further, I see nothing in the cited provisions limiting the Federal government from asking the question at issue. Consequently, I find that he failed to establish this affirmative defense.

In sum, OPM has established by preponderant evidence that the appellant intentionally falsified employment documents and that there is a nexus between the proven falsification and the efficiency of the service. The appellant has failed to establish any affirmative defense justifying mitigation or reversal of the penalty. Consequently, I find that OPM's negative suitability determination is within the tolerable limits of reasonableness and will not be disturbed. *See Morderosian,* 42 M.S.P.R. at 375; *Forsha,* 33 M.S.P.R. at 308.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: s/ Sherry A. Armstrong
Sherry A. Armstrong
Administrative Judge

APPENDIX E — INITIAL DECISION OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD, WASHINGTON REGIONAL OFFICE DATED JUNE 3, 1998

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBER
PH-0752-98-0213-I-1

REGINALD L. SYDNOR,

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

and

SOCIAL SECURITY ADMINISTRATION,

Agencies.

DATE: JUN 3 1998

* * *

BEFORE

Sherry A. Armstrong
Administrative Judge

Appendix E

INITIAL DECISION

On March 3, 1998, the appellant filed an appeal of the action of the Social Security Administration (SSA) placing him on indefinite suspension following a negative suitability determination issued by the Office of Personnel Management (OPM). Appeal File (AF), Tab 1. A separate appeal of the negative suitability determination is currently pending before this office. *Sydnor v. Office of Personnel Management,* MSPB Docket No. PH-0731-98-0188-I-1. For the reasons set forth below, the appeal is DISMISSED for lack of jurisdiction.

The following information is undisputed: The appellant was appointed to the SSA as an administrative law judge effective March 2, 1997. By letter dated August 19, 1997, OPM informed the appellant that the results of a background investigation raised "a serious question as to [his] current suitability for competitive Federal employment." AF, Tab 13, Exhibit A. Effective September 2, 1997, SSA relieved the appellant of his duties as an administrative law judge and placed him on paid administrative leave status. *See* AF, Tab 17. On January 13, 1998, upon consideration of the investigation results and the appellant's written reply, OPM found, *inter alia,* that the appellant was unsuitable for Federal employment and directed SSA to effect the appellant's removal within 30 days. AF, Tab 14, Exhibit D. OPM informed SSA that, if an appeal was filed, it may place the appellant on indefinite suspension as provided by regulatory authority. *Id.* On February 11, 1998, the appellant filed an appeal of OPM's suitability determination with the Board's Philadelphia Regional Office which was later

transferred to the Washington Regional Office for adjudication. AF, Tab 13, Exhibit B. Accordingly, effective February 12, 1998, SSA placed the appellant in suspension status and noted on the standard form 50 that its basis for the suspension was OPM's order. AF, Tab 13, Exhibit C.

The appellant contends that SSA erred in placing him on administrative leave and later on indefinite suspension. As noted above, the Board is separately adjudicating the suitability determination appeal and allegations that an unsuitable determination was unwarranted will be considered in that appeal. Further, the Board and the Federal Circuit have long held that being placed in paid administrative leave status is not appealable and, thus, does not require procedural protections. *See Henry v. Department of the Navy,* 902 F.2d 949, 954 (Fed.Cir. 1990); *Patton v. U.S. Postal Service,* 53 M.S.P.R. 21, 22-23 (1992). Consequently, the only issue in this appeal concerns SSA's action of placing the appellant on indefinite suspension in response to OPM's directive pending the outcome of his suitability appeal to the Board.

The Board's appellate jurisdiction is limited to those matters specifically conferred on it by statute or regulation. 5 U.S.C. § 7701(a). *See Saunders v. Merit Systems Protection Board,* 757 F.2d 1288, 1290 (Fed. Cir. 1985). The appellant bears the burden of establishing by preponderant evidence that the Board has jurisdiction over his appeal. 5 C.F.R. § 1201.56(a)(2). As the appellant was informed in the Board's acknowledgment order dated March 18, 1998, an issue existed as to the Board's jurisdiction over this appeal and the appellant was ordered to submit evidence and argument addressing this issue. AF, Tab 4. He responded

that his suspension was a disciplinary action requiring the procedural protections available to administrative law judges under 5 U.S.C. § 7521 and could not be summarily ordered by OPM and effected by SSA. AF, Tab 7.

The President of the United States has the express statutory authority to prescribe regulations which, *inter alia,* determine the fitness of applicants and appointees for Federal employment and which govern competitive service appointments. 5 U.S.C. §§ 3301 and 3302. Pursuant to authority provided in 5 U.S.C. § 1104, the President delegated absolute authority for personnel management functions to the Director of OPM. 44 Fed. Reg. 1055 (1978), as codified at 5 U.S.C. § 1103. Thus, OPM has the broad authority to execute, administer, and enforce civil service rules and regulations. *See Gaxiola v. Department of the Air Force,* 6 M.S.P.R. 515, 519 (1981). Accordingly, acting within its delegated authority, OPM promulgated regulations governing suitability determinations. *See* 5 C.F.R. Part 731. Pursuant to those regulations, an employee who has been suspended pending an appeal of a negative suitability determination has no right of appeal to the Board because part 752 of the regulations, which provide procedural protections and appeal rights in certain adverse actions, are deemed inapplicable. 5 C.F.R. § 731.501(c). However, the appellant asserts that he is not covered by part 752 because he is an administrative law judge and, consequently, that he has the procedural protections provided to administrative law judges in 5 U.S.C. § 7521. AF, Tab 7. He broadly asserts that any disciplinary action taken against an administrative law judge requires the statutory procedures provided in 5 U.S.C. § 7521. *Id.*

Appendix E

Administrative law judges do receive additional statutorily-prescribed procedural protections for designated actions including removal, suspension, reduction in grade or pay, or furlough for 30 days or less. *See* 5 U.S.C. § 7521; 5 C.F.R. § 930.214(a). However, as noted above, OPM has absolute authority, as delegated by the President, to determine the fitness of all employees in the competitive service, including administrative law judges. Accordingly, in its regulations governing the appointment and removal of administrative law judges, there is an express exception to 7521 procedures in actions involving suitability determinations of administrative law judges. *See* 5 C.F.R. Part 930, Subpart B. OPM's regulations specifically provide that the procedural protections afforded to administrative law judges "do not apply in making dismissals or taking other actions requested by OPM under §§ 5.2 and 5.3 of this chapter . . ." 5 C. F. R. § 930.214(c). The cited provisions are two of the civil service rules on which the statutory and regulatory framework of the civil service system is founded. 5 C.F.R. § 5.2 provides OPM with the authority to investigate the qualifications and suitability of applicants for positions in the competitive service. *See Logan v. Office of Personnel Management,* 38 M.S.P.R. 612, 614 (1987). 5 C.F.R. § 5.3 grants OPM the authority to instruct an agency to separate or take other action against an employee serving an appointment when OPM finds that the employee is disqualified for Federal employment. *Id.* OPM has express authority to instruct the employing agency as to whether or not the employee should remain on duty and continue to receive pay pending adjudication of the appeal. 5 C.F.R. § 5.3. As the Board has previously held, OPM has authority pursuant to 5 C.F.R. § 5.3 to correct an erroneous

qualification determination of an employee by directing the appropriate agency to take the necessary action. *See Post v. Office of Personnel Management,* 27 M.S.P.R. 572, 575 (1985).

In sum, pursuant to civil service rules found at 5 C.F.R. §§ 5.2 and 5.3, OPM has the delegated legal authority to conduct investigations, determine the fitness of applicants or appointees, and order an agency to separate an employee found unsuitable for employment. Applicable authority expressly provides that actions taken against administrative law judges pursuant to these regulatory provisions are excepted from the procedural protections otherwise provided.[1] 5 C.F.R. § 930.214(c). Thus, the appellant has no entitlement to the additional procedural protections afforded to administrative law judges in other actions. He has cited no other legal authority by which the Board has jurisdiction over this appeal.

The appellant argued that the agency engaged in illegal discrimination. However, the Board lacks authority to hear a discrimination complaint absent a matter that is otherwise appealable to the Board. *See Collins v. Defense Logistics Agency,* 55 M.S.P.R. 185, 190 (1992), *modified on other grounds, Ferdon v. United States Postal Service,* 60 M. S.P.R. 325 (1994).

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1. Similarly, in cases of negative suitability determinations of other employees, the Board has found valid OPM's regulation that the employee may be summarily placed in indefinite suspension pending appeal, despite the procedural protections normally afforded in cases of indefinite suspension under 5 U.S.C. § 7513. *See, e.g., Ward v. Department of the* Navy, 44 M.S.P.R. 493 (1990).

Appendix E

In light of foregoing, I find that the appellant has failed to meet his burden of proof with respect to the issue of jurisdiction. *See* 5 C.F.R. § 1201.56(a)(2)(i). It is therefore appropriate that the appeal be dismissed. Although the appellant requested a hearing, he raised no issues of fact sufficient to establish Board jurisdiction and his request for a hearing is denied. *See Dumas v. Merit Systems Protection Board,* 789 F.2d 892, 894 (Fed. Cir. 1986).

DECISION

The appeal is DISMISSED for lack of jurisdiction.

FOR THE BOARD:

s/ Sherry A. Armstrong
Sherry A. Armstrong
Administrative Judge

APPENDIX F — LETTER FROM ROBERT E. TAYLOR, UNITED STATES MERIT SYSTEMS PROTECTION BOARD TO ALAN B. EPSTEIN, ESQ. DATED MAY 12, 1998

U.S. MERIT SYSTEMS PROTECTION BOARD
1120 Vermont Ave., NW.
Washington, DC 20419

Clerk of the Board
May 12, 1998

Alan B. Epstein, Esq.
The Bellevue, 9th Floor
Broad Street at Walnut
Philadelphia, PA 19102

RE: *Reginald L. Sydnor v. Office of Personnel Management*
Docket No. PH-0731-98-0188-I-1
Reginald L. Sydnor v. Social Security Administration
Docket No. PH-0752-98-0213-I-1

Dear Mr. Epstein:

This is in response to your filings dated May 4, 1998, captioned "Petition for Review of Judge Armstrong's Denial of Appellant's Motion for Certification of an Interlocutory Appeal on the Issue of Whether Appeal No. PH-0731-98-0188-I-1 Should be Heard by An Administrative Law Judge and Whether the Social Security Administration is a Proper Responding Agency to That Appeal", "Appellant's Motion to Have Both Appealed Actions Against Both Agencies Assigned and Heard by an Administrative Law Judge", "Memorandum of Law in Support of

Appendix F

Appellant's Motion for a Hearing on Both Appeals Before an Administrative Law Judge", and "Appellant's Motion for Certification of and Interlocutory Appeal on the Issue of Whether Appeal No. PH-0731-98-0188-I-1 Should be Heard by an Administrative Law Judge and Whether the Social Security Administration is a Proper Responding Agency to that Appeal".

The Board's regulations do not provide for a petition for review of an administrative judge's denial of a motion for certification of an interlocutory appeal. Further, the Board does not entertain motions for certification of interlocutory appeals. Such a motion can be made only to the judge, in this case, Judge Armstrong, under the provisions of 5 C.F.R. § 1201.93.

As you are aware, our regulations provide that an administrative judge's initial decision may be reviewed by the Board on petition for review after the initial decision is issued. Any disagreements a party may have with a ruling or determination by the judge may be made on petition for review. Therefore, parties should raise and preserve objections during proceedings in order to raise them on petition for review.

Your filings are being forwarded to Judge Armstrong for inclusion in the records.

Sincerely,

s/ Robert E. Taylor
Robert E. Taylor

APPENDIX G — ORDER OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD, WASHINGTON REGIONAL OFFICE DENYING APPELLANT'S MOTION FOR INTERLOCUTORY APPEAL AND DENYING MOTION FOR PETITION FOR REVIEW OF DENIAL DATED MAY 5, 1998

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBER
PH-0731-98-0188-I-1

REGINALD L. SYDNOR,

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Agency.

DATE: MAY 5, 1998

* * *

By motion dated April 23, 1998, the appellant filed an interlocutory appeal seeking review of my order denying his motions to have the appeal of OPM's suitability determination heard by an administrative law judge and to name the Social Security Administration as a party in the

suitability appeal. Although the motion for an interlocutory appeal was denied in a subsequent status conference, the denial was erroneously not memorialized for the record.

Pursuant to the Board's regulation, an administrative judge will certify a ruling for review only if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to the party or the public. 5 C.F.R. § 1201.92. Although the appellant disagrees with my rulings, it is my determination that that the issues in question do not present an important question of law or policy about which there should be a substantial basis for a difference of opinion. Accordingly, the appellant's motion for an interlocutory appeal is DENIED.

Subsequent to my oral denial of his motion for an interlocutory appeal, by submission dated May 5, 1998, the appellant filed a motion seeking petition for review of my ruling on this issue. The appellant's motion is frivolous and reflects a failure to review the Board's regulations or relevant caselaw prior to filing the motion. The Board's regulations for an interlocutory appeal expressly provide that: "[i]f the judge denies the motion, the party that sought certification may raise the matter at issue in a petition for review filed *after* the initial decision is issued, in accordance with §§ 1201.113 and 1201.114." 5 C.F.R. § 1201.93(b) (emphasis supplied). *See Crumbaker v. Department of Labor,* 7 M.S.P.R. 84, 91 (1981); *Bauer v. Department of the Treasury,* 4 M.S.P.R. 357, 358 (1980). As the appellant is

undoubtedly aware, no initial decision has yet been issued in this appeal. At the time an initial decision is issued, the appellant will receive instructions on how to file a petition for review with the full Board. Until that time, his motion is premature and is DENIED.

FOR THE BOARD:

s/ Sherry A. Armstrong
Sherry A. Armstrong
Administrative Judge

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 10, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1035
CA-99-228-JFM

REGINALD L. SYDNOR

Plaintiff – Appellant

v.

JANICE LACHANCE, Head of the Office of Personnel Management; KENNETH S. APFEL, Secretary, Department of Health and Human Services, Commissioner, Social Security Administration

Defendants – Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

Appendix H

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX I — MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND FILED JULY 18, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1035
CA-99-228-JFM

MANDATE

The judgment of this Court dated 3/30/00 takes effect today.

PATRICIA S. CONNOR
CLERK

APPENDIX J — ADDITIONAL RELEVANT DOCUMENTS

[Omitted here but submitted separately in Lodging Appendix]